83-272

No. _____

In The

Supreme Court of the United States

October Term, 1983

BASIC CONSTRUCTION COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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August 19, 1983

QUESTIONS PRESENTED

1. Whether a corporation should be subject to strict antitrust criminal liability for acts of employees which violate the corporation's longstanding and strictly enforced policy of antitrust compliance.

2. Whether the Court of Appeals erred when it found that the trial court erred in excluding evidence relating to the truth and veracity of the Basic employee who violated the company's express policy against bid rigging but nevertheless failed to award Basic a new trial.

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Basic Construction Company (Basic) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reprinted in the Appendix to this petition.

II.
JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1983. On July 21, 1983, the Court of Appeals stayed the issuance of its mandate for thirty days until August 19, 1983, pending the filing of a petition for writ of certiorari. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

III.

STATEMENT OF THE CASE

This bid-rigging case arises out of an indictment returned by a federal grand jury on October 13, 1981, charging that Basic Construction Company, David M. Howell, Henry S. Branscome, Inc., Henry S. Branscome and other unnamed co-conspirators had engaged in a conspiracy in violation of Section 1 of the Sherman Act to allocate plant mix schedule work let by the State of Virginia in 1978. Pursuant to Basic's motion, the district court severed the case against David M. Howell, a former Basic employee, for separate trial. The trial of the remaining defendants took place February 22-26, 1982, in the United States District Court for the Eastern District of Virginia in Newport News, Virginia. At the conclusion of the trial all defendants, including Basic, were found guilty. Basic was subsequently fined $450,000.00 for its alleged participation in the conspiracy.

According to the Court of Appeals, the evidence for Basic "tended to prove that it had a longstanding, well known, and strictly enforced policy against bid rigging." Basic's management repeatedly admonished all its employees, including Howell and Steve Colosi in its Highway Department, to refrain from contacts with competitors. Basic employees testified that they had received and understood Basic's policy against collusion. They were well aware that any failure to adhere to the policy would be met with swift and sure sanctions including involuntary termination.

At trial Basic never disputed the involvement of Howell and Colosi, neither of whom was an officer in Basic, in the bid-rigging scheme. Indeed, when Basic had reliable information that they had been involved in the scheme it terminated them both for violation of Basic's policy. Both had been terminated for more than a year before any indictment

was returned against Basic. Colosi, testifying with immunity, was the principal witness against Basic.

At conclusion of the trial, Basic requested the following charge to the jury on the issue of the corporation's intent:

> As I have just instructed you, the Government must prove beyond a reasonable doubt that each corporation possessed the required intent as defined in these instructions. One of the factors which you may consider in determining the intent of each corporation, among other evidence, is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary intent. If, however, you find that a corporation acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would not violate the law, you may take this fact into account in determining whether or not the corporation had the required intent. You may consider such a compliance program only as to the intent of the company which propounded it. You may not consider it in determining the intent of any individual defendant.

The court refused Basic's proposed charge and instead charged the jury:

> When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it. This is true even though the agent's acts may be unlawful, and contrary to the corporations actual instructions.
>
> However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact were acting to benefit the corporation.

On appeal, the United States Court of Appeals for the Fourth Circuit by a 2-1 vote affirmed the convictions even though it found the trial court had erred in exclusion of testimony relating to the credibility of Colosi.[1] Judge Widener dissented on the ground that the trial court's failure to admit evidence of Colosi's bad character for truthfulness was not harmless error.

IV.

REASONS FOR GRANTING THE PETITION

The failure of the trial court to charge as Basic requested, and the charge actually given violated both the spirit and letter of this Court's decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) for at least two reasons: (1) the charge as given imposed strict criminal liability on Basic under the antitrust laws for acts of two relatively minor officials even though those employees violated explicit corporate policy and instructions; and (2) the jury was entitled to consider Basic's diligent enforcement of an antitrust compliance policy and its employees' disobedience of management's explicit instructions on the issue of the corporation's criminal intent. In addition, Basic was deprived of its opportunity to introduce evidence relating to the truth and veracity of the government's principal witness—the employee who had violated the Company's policy and had been terminated for doing so.

A. The Trial Court's Charge Improperly Fixed Absolute Criminal Liability On The Corporation For The Acts Of Employees Which Were Contrary To Explicit Company Policy And Instructions

In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), several manufacturers of gypsum board were

[1] Basic Construction Company, Henry S. Branscome and Henry S. Branscome, Inc. were appellants in the court below.

charged with using price verification among competitors to fix prices in violation of Section 1 of the Sherman Act. The trial court gave the traditional jury charge which permitted the jury to presume criminal intent as a matter of law. Affirming the Court of Appeals' reversal of the defendants' conviction, this Court reexamined the traditional presumption of intent and held that in all Sherman Act Section 1 cases:

> [A] defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. 438 U.S. at 435.

Unlike regulatory crimes, the Sherman Act could not be construed "as mandating a regime of strict liability criminal offenses." 438 U.S. at 436. Instead, in any criminal case brought under the antitrust laws, intent must be shown by proof either (1) that a defendant acted with the conscious purpose of producing anti-competitive effects or (2) that a defendant acted with knowledge of the probable consequences and such consequences did, in fact, result. 438 U.S. at 444. Absent such proof "the imposition of criminal liability on a corporate official, or for that matter on a corporation directly" holds out the distinct possibility of over-deterrence. 438 U.S. at 441.

In the *Gypsum* case this Court drew no distinction between treatment of *per se* or rule of reason offenses. This Court categorically held that "intent is a necessary element of a criminal antitrust violation." 438 U.S. at 443. Chief Justice Burger wrote that "[t]he criminal offenses defined by the Sherman Act should be construed as including intent as an element." 438 U.S. at 443. The Court's broad holding

was based upon the most fundamental principle of criminal law that "*mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." 438 U.S. at 436, quoting from *Dennis* v. *United States*, 341 U.S. 494, 500 (1951).

Gypsum imposes a burden upon the Government to prove that a corporate defendant, like any individual defendant, had the requisite criminal intent. It therefore follows that the intent of relatively minor officials, as the Fourth Circuit characterized Howell and Colosi, cannot be automatically imputed to the employer. Yet that is precisely what the trial court's charge did. If the corporation has diligently promulgated and enforced an antitrust compliance policy to ensure that its employees would abide by the law, then a finding that the corporation intentionally violated the antitrust laws based on the employee's unauthorized acts violates both the spirit and letter of the *Gypsum* decision.

At trial the evidence for Basic showed that instead of disseminating a sanitized memorandum, the Company chose the most effective means of communicating its policy to its employees Basic's officers called its employees in and informed them personally that rigging of bids on highway projects was absolutely prohibited. The employees regarded management's warnings seriously and were well aware that any breach of the policy would result in dismissal. JA 172-73.

However, relying upon the doctrine of respondeat superior, the trial court gave instructions which fixed absolute criminal liability on the corporation even though its employees had deliberately disobeyed management's policies and explicit instructions. The trial court imposed the general rule of vicarious liability for the acts of agents and employees, a policy which should not apply when the cor-

poration faces severe criminal sanctions for the unauthorized acts of its employees.

The avoidance of such inequitable results from antitrust prosecutions was precisely the object of this Court's opinion in the *Gypsum* case. Chief Justice Burger wrote that:

> While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status. 438 U.S. at 437.

By applying respondeat superior principles to corporate criminal defendants, the dectrine of respondeat superior turns Section 1 cases into a strict liability offense. But Section 1 cases in the Court's view are clearly not to be treated as strict liability offenses. "While in certain cases [the Court has] imputed a regulatory purpose to Congress in choosing to employ criminal sanctions . . . the availability of a range of nonpenal alternatives to the criminal sanctions of the Sherman Act negates the imputation of any such purpose to Congress in the instant context." 438 U.S. at 442.

This Court has frequently turned to the American Law Institute's Model Penal Code for assistance. *See United States* v. *Bailey*, 444 U.S. 394 (1980). Section 2.07 of that code provides:

> In any prosecution of a corporation . . . for the commission of an offense . . . other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

Section 2.07 rests criminal responsibility on the blameworthiness of the corporation itself and affords corporate defendants an opportunity to establish the absence of blameworthiness. It recognizes that criminal liability for the acts of lower level employees should be precluded so long as corporate officers with the power to control the decisions of the corporation exercise due diligence to prevent the commission of the offense charged. Yet Basic's proposed charge, founded upon that principle, was refused.

That a corporation's diligent enforcement of an antitrust compliance policy may provide a defense to a Section 1 prosecution is not new. In *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973) the court held that a corporate defendant might gain exculpation if it had enforced its compliance program "by means commensurate with the obvious risks." The court drew a careful distinction between general instructions and a meaningful compliance policy. While general instructions to obey the Sherman Act "are least likely to be taken seriously," the Ninth Circuit suggested that diligent enforcement efforts would permit exculpation. In this case specific instructions were issued directly to the personnel involved that Basic's policy prohibited collusion with competitors on highway contracts. Management and employees alike understood that any failure to adhere to the policy would meet with swift and sure punishment. In the corporate context there are no more severe "means [of enforcement] commensurate with the obvious risk" than involuntary termination of the errant employee. Basic was, however, not only denied its opportunity to argue that its instructions constituted a defense to the offense charged, Basic was also precluded from going to the jury with its evidence on the issue of criminal intent.

Basic asked for a charge which would have permitted the jury to consider its antitrust compliance policy on the issue of criminal intent. The court refused the proposed instruction, however, and told the jury that Basic would be criminally responsible for the acts of its employees even though the employees had deliberately disobeyed management instructions. At a minimum, the jury was entitled to consider that evidence on the issue of Basic's intent to violate the antitrust laws. But the District Court and the Court of Appeals have in effect ruled that acts of low-ranking employees can be imputed to the corporation while conduct of the management is irrelevant.

In *United States* v. *Koppers Co., Inc.*, Crim. No. 79-85 (D. Conn., June 26, 1980), the District Court "found evidence of compliance efforts admissible as 'relevant and competent evidence' to show that the defendant went beyond 'a simple statement of policy' and did 'take further efforts to ensure that their employees are in face apprised of the policy and are instructed to comport their conduct to it.' " Transcript of chambers conference 15-17 *reprinted in* Lipson, *A Survey on the Ins and Outs of Antitrust Compliance*, 51 Antitrust L.J. 517, 524 (1983). Because the company had shown more than mere issuance of general instructions to its employees, the court rejected the Government's proposed vicarious liability instruction and instead charged the jury along the lines of the charge derived from § 2.07 of the Model Penal Code. On appeal, the Second Circuit approved the District Court's use of Model Penal Code § 2.07 in antitrust cases. *United States* v. *Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981), *cert. denied* 454 U.S. 1083 (1981).

These cases illustrate the emerging rule that the jury must be afforded an opportunity to consider the promulga-

tion, dissemination and enforcement of an antitrust compliance policy when determining whether the defendant corporation had the requisite criminal intent. Under Section 2.07 of the Model Penal Code, a corporation may defend on grounds that its managerial agents exercised due diligence to prevent criminal violations by lower echelon employees. In this case Basic was deprived of its opportunity to show that it exercised due diligence to enforce its antitrust compliance policy on a critical jury issue—whether it had the requisite criminal intent to commit the offense charged.

B. The Court Of Appeals Erred In Failing To Grant A New Trial When The Trial Court Excluded Evidence Relating To The Truth And Veracity Of The Basic Employee Who Violated The Company's Express Policy Against Bid Rigging

While Basic was prevented from going to the jury on the issue of its criminal intent and instead had the conduct of its employees imputed to it, Basic also was deprived of its opportunity to introduce evidence relating to the truth and veracity of Steve Colosi, the Basic employee who so cavalierly violated the company's policies and instructions. The only suggestion in the record that any management officials of Basic had any idea Colosi and Howell were participating in a bid-rigging conspiracy was testimony by Mr. Colosi to the effect that he had said something about trading work in the presence of a Basic vice-president. All the others present at the time who testified flatly denied the statement was made.

Basic sought to offer in its direct case testimony by Colosi's co-workers that in their opinion Colosi was neither honest nor trustworthy. Out of the presence of the jury

John M. "Jack" Holloway, a plant foreman who worked for Colosi testified:

> Q. Now, based on a long period of time that you worked under the supervision of Mr. Colosi, do you have an opinion as to Mr. Colosi's honesty and trustworthiness?
>
> A. Yes, sir. I don't think he knows what the word means.

JA 303. The trial judge ruled that "[e]vidence as to what Mr. Holloway's opinion is as to the truth or untruthfulness of Mr. Colosi has absolutely no place in this case, and I'm not going to admit that." JA 303.

Basic also proffered the opinion of Dale Wood as to Colosi's honesty and trustworthiness. JA 304. Mr. Wood was manager of Basic's Ark plant and served under Colosi as an estimator. The trial judge ruled that Mr. Wood's proffered testimony was "not within the rules." JA 304. The Court of Appeals held that rejection of the evidence was error, but two of the three judges decided it was harmless error.

The courts have long recognized that testimony regarding a witness' reputation for truth and veracity in the community is relevant and admissible. *United States* v. *Truslow*, 530 F.2d 257, 265 (4th Cir. 1975). The practice is now codified in Fed.R.Evid. 608(a) which authorizes an attack on a witness' credibility through an opinion of the witness' truthfulness. Witnesses may now be asked directly to state their opinion of another witness' character for truthfulness. "So the inquiry under the new rules is not limited as heretofore to knowledge of reputation for truth and veracity, but also may include opinion of character for truthfulness or untruthfulness." *United States* v. *Mandel*, 591 F.2d

1347, 1370 (4th Cir. 1979), *cert, denied,* 445 U.S. 961 (1980).

Courts which have addressed the question have held that the exclusion of evidence concerning a witness' character for truthfulness constitutes reversible error. In *United States* v. *Davis,* 639 F.2d 239, 244 (5th Cir. 1981), the defendant proffered evidence, which was refused, from two witnesses to discredit the key Government witness. The court acknowledged that impeachment evidence offered under Fed.R.Evid. 608(a) may be excluded under Fed.R. Evid. 403 if its probative value is substantially outweighed by its needlessly cumulative nature. The Fifth Circuit therefore weighed the probative value of the evidence against its cumulative nature keeping in mind that the "'substantially outweighed' requirement is designed to further a policy favoring the admissibility of evidence." 639 F.2d at 244 *citing* 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5221 (1978). Upon balancing six factors the Fifth Circuit in *Davis* held that the district court had exceeded its discretion in excluding the two character witnesses and, in so doing, had committed error of constitutional proportions. 639 F.2d at 245.

Colosi was the Government's key witness against Basic. The United States relied upon him heavily to contradict facts established by Basic, particularly as to Basic's defense that no responsible corporate official knew of, or condoned, Colosi's conspiratorial activities. No other character witnesses were called by Basic to impeach Colosi's veracity. Certainly, the proffered evidence from Holloway and Wood would not have measurably delayed the trial. Holloway's proffered testimony consumed but five pages of the 1149 page trial transcript. Like *Davis* the Government's case lasted almost three days, while Basic's case took less than a

day. In short, under facts remarkably similar to those balanced by the Fifth Circuit in *Davis*, the probative value of the evidence was not substantially outweighed by its alleged cumulative nature. In excluding the evidence the court committed plain error which reached constitutional proportions, because Colosi's testimony was central to the Government's case, and Basic was deprived of its right to impeach his credibility by evidence as to his character for untruthfulness. *United States* v. *Davis*, 639 F.2d 239, 245 (5th Cir. 1981).

V.

CONCLUSION

This case affords the Court an opportunity to clarify the law as to the antitrust criminal responsibility of a corporation for the unauthorized acts of its minor employees. This Court has never explicitly ruled on that question. Both *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973), and *United States* v. *Koppers Co., Inc.*, 652 F.2d 290 (2d Cir. 1981), *cert. denied* 454 U.S. 1083 (1981), have recently raised aspects of this issue. The issue constantly arises in the lower courts and results in confusion in the law. For example, in *Koppers* the Second Circuit explicitly approved the rationale of § 2.07(1)(a) of the Model Penal Code. The trial court here rejected a charge based on that same section, and the Fourth Circuit found no error in its having done so.

Furthermore, the Court of Appeals has misconstrued this Court's explanation in *Gypsum* of intent in a Section 1 Sherman Act case. The proper standards of criminal intent in *Gypsum* warrant restating.

Although the corporation's criminal intent is an essential element of a Section 1 offense, Basic was precluded from arguing to the jury that the company's management had promulgated and enforced a policy of adherence to the antitrust laws. Instead, the jury was told that Basic could be held criminally responsible for its employees' conduct even though the employees deliberately ignored management's instructions. If this Court's decision in *Gypsum* is to have any meaning for corporations accused of Section 1 offenses, then a defendant corporation must have the opportunity to show that it diligently disseminated and enforced a policy of antitrust compliance on the issue of the corporation's criminal intent.

Finally, the standards for ordering a new trial where error has been committed in the exclusion of impeachment testimony need to be reconciled. The Fifth Circuit's opinion in *United States* v. *Davis* cannot be reconciled with the Fourth Circuit's opinion here finding no prejudicial error in exclusion of such testimony.

Respectfully submitted,

BASIC CONSTRUCTION COMPANY

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Counsel

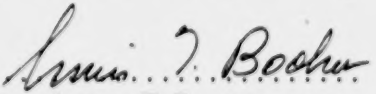
CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court I this day served three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit upon each counsel for all of the parties required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

(1) William J. Murphy, Vincent J. Fuller, Barry S. Simon, Linda C. Ray, Williams & Connolly, 839 - 17th Street, N.W., Washington, D.C. 20006; and William F. Miller, Rideout & Miller, 210 Parkway Drive, P. O. Box CK, Williamsburg, Virginia 23185 (counsel to Henry S. Branscome and Henry S. Branscome, Inc.);

(2) Margaret G. Halpern, Department of Justice, William F. Baxter, Assistant Attorney General, John J. Powers, III, Department of Justice, Theresa H. Clinton, Diane R. Kilbourne, Antitrust Division - Room 3313, Department of Justice, Washington, D.C. 20530 (counsel to the United States); and

(3) Solicitor General, Department of Justice, Washington, D.C. 20530.

By 
LEWIS T. BOOKER

Date: August 19, 1983

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Nos. 82-5200, 82-5207, 82-5208

UNITED STATES OF AMERICA

Appellee

v.

BASIC CONSTRUCTION COMPANY,
HENRY S. BRANSCOME,
HENRY S. BRANSCOME, INC.

Appellants

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, District Judge.

Argued February 9, 1983 Decided June 27, 1983

Before BUTZNER, Senior Circuit Judge, and RUSSELL and WIDENER, Circuit Judges.

Lewis T. Booker (L. Neal Ellis, Jr., Hunton & Williams, on brief) and William J. Murphy (Vincent J. Fuller, Barry S. Simon, Linda C. Ray, Williams & Connolly; William F. Miller, Rideout & Miller, on brief) for Appellants; Margaret

G. Halpern, Department of Justice (William F. Baxter, Assistant Attorney General; John J. Powers, III, Department of Justice; Theresa H. Clinton, Diana R. Kilbourne, on brief) for Appellee.

PER CURIAM:

This is an appeal from a conviction for violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The defendants, Basic Construction Co., Henry S. Branscome, Inc.,[1] and Henry Branscome, were charged with conspiring in April of 1978 to rig the bidding for state road paving contracts. A jury found the defendants guilty, and both Basic and Branscome[1] appeal. We affirm.

I.

Basic's principal contention is that the district court gave erroneous jury instructions regarding the criminal liability of a corporation for acts of its employees. With regard to corporate liability, the court instructed the jury as follows:

> A corporation is legally bound by the acts or statements of its agents done or made within the scope of their employment, and within their apparent authority, acts done within the scope of employment and acts done on behalf of or to the benefit of a corporation, and directly related to the performance of the type duties the employee has general authority to perform.
>
> . . . .
>
> When the act of an agent is within the scope of his employment or within the scope of his apparent au-

[1] Henry S. Branscome, Inc., and its owner, Henry Branscome, filed a joint appeal. Together they will be referred to as "Branscome."

> thority, the corporation is held legally responsible for it. This is true even though the agent's acts may be unlawful, and contrary to the corporations [sic] actual instructions.
>
> . . . .
>
> A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position.
>
> However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.

At trial, Basic introduced evidence which would have tended to prove that it had a longstanding, well known, and strictly enforced policy against bid rigging. Such evidence tended to show that the bid rigging activities for which it was charged were perpetrated by two relatively minor officials and were done without the knowledge of high level corporate officers. Basic argues that, in light of this evidence, the district court should have instructed the jury that it could consider the evidence of Basic's antitrust compliance policy in deciding whether the company had the requisite intent to violate the Sherman Act.

Basic rests its argument primarily on *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). *Gypsum* involved a criminal antitrust prosecution in which the district court had instructed the jury that, if it found that the practice of competing producers giving to other producers on request, the price of gypsum board that was currently offered to a specific customer had the effect of fixing or raising prices, then they should presume as a matter of law that the parties intended such a result. *Id.* at 434. The

Supreme Court held that these instructions were erroneous. The Court said that intent is an element that must be proved, and cannot be presumed, in a criminal antitrust prosecution. *Id.* at 434-36. Basic argues that the instructions given by the district court in the instant case run counter to the holding in *Gypsum* because they fix absolute criminal liability on a corporation for acts done by its employees, although such acts may have been in violation of corporate policies and express instructions. *Gypsum*, Basic argues, requires that the government prove that the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the antitrust laws. Consequently, Basic asserts that the jury should have been instructed to consider corporate antitrust compliance policies in determining whether Basic had the requisite intent.

We do not think that *Gypsum* requires so much. Rather, the case, on the point at issue, holds that intent to violate the antitrust laws must be proved in a criminal antitrust prosecution, and it defines the required intent. The Court there was not confronted with, and did not decide, the issue of corporate liability for the acts of employees. The instructions given by the district court in the instant case are amply supported by case law. *See United States* v. *Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 410 U.S. 948 (1971). These cases hold that a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority,

and for the benefit of the corporation, even if, as in *Hilton Hotels* and *American Radiator*, such acts were against corporate policy or express instructions. In *United States* v. *Koppers Co.*, the Second Circuit rejected the argument, as do we, that *Gypsum* changes the law on corporate criminal antitrust liability for the acts of its employees. 652 F.2d at 298.

In the instant case, the district court properly allowed the jury to consider Basic's alleged antitrust compliance policy in determining whether the employees were acting for the benefit of the corporation. It also properly instructed on the issue of intent in an antitrust prosecution, i.e., that corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation.

II.

Basic also argues that the court erroneously admitted evidence of an admission by silence by one of Basic's corporate officers, William Shaw. At trial, one of Basic's minor officials, Colosi, testified about a meeting he had with Shaw and another minor official of Basic, Howell, regarding the bidding on another road project. Colosi testified that at the end of the meeting, as he was leaving the room, he heard Howell say to Shaw, "I'll see if we can get anything for this work." Colosi did not hear any reply by Shaw. Colosi further testified that he believed this referred to bid rigging and that Howell was talking about trading the job there being discussed for one in the future.

Basic contends that the district court erred in admitting this evidence because it claims there was no evidence that

Shaw heard, understood, or acquiesced in Howell's statement to him so as to render the evidence admissible as an admission under FRE 801(d)(2)(B).

Howell, Colosi, and Shaw were all present in the same room when the conversation took place, and we think there was credible evidence to support the government's position that Shaw heard, understood, and acquiesced in Howell's statement, thus meeting the requirements of FRE (801(d)(2)(B). *See United States* v. *Moore*, 522 F.2d 1068, 1075-76 (9th Cir. 1975). From the transcript, it is clear the court properly decided the relevance of the statement as going to Basic's defense that it had a longstanding policy against bid rigging, but, of course, as the trial court recognized, it could have been used by the jury for any purpose, and there was no request to limit it.

The testimony came during the government's case in chief and was in rebuttal to a defense Basic had previously articulated, that of its longstanding policy against bid rigging. Yet, at the time the evidence was admitted, the claimed defense had not been the subject of evidence offered by Basic or sought to be established by cross-examination. We think the practice of admitting evidence to refute a defendant's opening statement in a criminal case is a practice to be discouraged and that rebuttal evidence ordinarily should not be permitted for that purpose during the government's case in chief. A criminal case is far different from a civil case in which the pleaded position of a party may establish relevance, and in nearly all instances in the defense of a criminal case the defendant does not finally have to decide on the defense he will make until the government closes its case in chief. Thus, in some instances, admitting evidence to rebut a defense made by a criminal defendant only in the opening statement of his attorney may get highly prejudicial

and irrelevant evidence into the record. In this case, the defendant followed through on its articulated defense, so any error committed in admitting the conversation between Howell and Shaw was harmless. But this is not to say that it would be so in all cases, and, as we have said, the practice should be discouraged.

III.

Branscome contends that it was reversible error for the district court to permit the introduction of evidence concerning the conviction of a codefendant, Howell. Howell, a former Basic employee, was included in the indictment against Basic and Branscome, but was tried and convicted separately prior to the trial of Branscome and Basic. At a pretrial conference, counsel for Basic said that he intended to bring out the fact that Howell was convicted, and the court ruled, over Branscome's objection, that both Basic and the government could refer to Howell's conviction.

During trial, two references were made to Howell's conviction. The first reference was made in the government's opening statement. The second reference was made during the direct examination of Colosi. When Colosi was asked about the result of Howell's trial, the court interrupted the questioning and stated that Howell had been tried and convicted. The court further said that the conviction of Howell had nothing to do with the trial of the other three defendants. At the conclusion of the trial, the court again cautioned the jury that they were not to be concerned with any disposition made with respect to a co-defendant not on trial in the case at bar. No other reference was made to Howell's conviction.

Branscome's contention that the admission of this evidence is reversible error is controlled by *United States* v.

Curry, 512 F.2d 1299 (4th Cir.), *cert. denied*, 423 U.S. 832 (1975). In *Curry* we held that it was not error for the court to tell the jury that certain codefendants charged in the same indictment as the defendants being tried had plead nolo contendre. *Id.* at 1303. We noted that, although it might be preferable to tell the jury only that the case against the codefendants had been previously disposed of, any prejudice caused by the evidence was cured by instructions that the jury could not consider the pleas as evidence of guilt of the defendants on trial. *Id.* We therefore hold that the references made to Howell's conviction in conjunction with timely and appropriate cautionary instructions do not constitute reversible error. We caution, however, that it is far better to simply tell the jury that cases of codefendants not on trial have been disposed of without saying how, and that they should not consider that matter, particularly as evidence of guilt.

IV.

Steve Colosi, a key government witness, was one of the Basic employees directly involved in the bid-rigging conspiracy. At trial he testified as to the events surrounding the conspiracy charged and the practices and attitudes of other Basic employees regarding bid rigging. Basic attempted to impeach Colosi's testimony by presenting the testimony of two witnesses as to their opinions of Colosi's honesty and trustworthiness. According to Basic's offer of proof, these witnesses would have testified that Colosi was neither honest nor trustworthy. The district court, however, refused to admit the evidence, stating that it had "absolutely no place in this case."

Basic asserts that the district court erred in refusing to admit this evidence, and we agree. Federal Rule of Evidence

608(a) expressly allows impeachment through opinion evidence of a witness's character for truthfulness. *See United States* v. *Truslow*, 530 F.2d 257, 264-65 (4th Cir. 1975); A. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 346-47 (3d ed. 1982). Under the facts of this case, however, the district court's refusal to admit the evidence did not affect substantial rights and therefore was harmless error. 28 U.S.C. § 2111; Federal Rules of Criminal Procedure 52(a).

We base our conclusion that the exclusion of the evidence was harmless error on several considerations. First, Basic thoroughly attacked Colosi's credibility on cross-examination. Colosi admitted lying to counsel during a pre-trial interview about his bid-rigging activities, to using without permission company vehicles and gasoline for personal purposes, and to paving his driveway with materials and labor procured from Basic. Second, at least one of the witnesses willing to testify as to his opinion of Colosi's character for honesty and trustworthiness was a Basic employee at the time of trial. This relationship to Basic might well have weakened the weight of that particular opinion evidence. Third, much of Colosi's testimony related to the events surrounding the April 1978 bid-rigging conspiracy. The government, however, presented the testimony of two other witnesses who were involved in the conspiracy, and their testimony regarding the events was in agreement with that of Colosi's testimony.

Taken together, these considerations lead us to the conclusion that it is highly unlikely that the district court's refusal to allow opinion evidence as to Colosi's character for truthfulness would have affected the outcome of the trial. We therefore hold that the district court's ruling was harmless error.

We have considered the appellant's remaining assignments of error and find them to be without merit.

Accordingly, the convictions are

Affirmed.

Judge Russell and Judge Butzner concur in the opinion and in the result.

Judge Widener concurs in all of the opinion except part IV. While he agrees that the failure to admit the evidence of Colosi's bad character for truthfulness was error, he does not agree that it was harmless, and thus he cannot agree in the result. He therefore respectfully dissents and would award a new trial.

No. 83-272

In the Supreme Court of the United States

OCTOBER TERM, 1983

BASIC CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury was correctly instructed that a corporation may be responsible for the acts of its agents performed within the scope of their authority and to benefit the corporation.

2. Whether petitioner was prejudiced by the exclusion of testimony impeaching a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 711 F. 2d 570.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Basic Construction Company, its former employee David M. Howell, and two other defendants, Henry S. Branscome, Inc. and Henry S. Branscome, were indicted in the Eastern District of Virginia for conspiring to rig bids on highway surface paving contracts in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1. The indictment charged that the defendants and others

allocated among themselves highway surface paving contracts let in the Peninsula area by the Commonwealth of Virginia in April 1978.[1]

On petitioner's motion, the trial of David Howell, the former manager of Basic's highway division, was severed from the trial of the remaining defendants. See Order of November 24, 1981, Docket Item 14 (C.A. App. 3). Howell was convicted by a jury on December 9, 1981. The remaining defendants were convicted by a jury on February 26, 1982[2].

2. At trial, petitioner admitted (Tr. 1046) that its employees, through a series of meetings and telephone conversations, had conspired with personnel of other construction companies to allocate four highway resurfacing contracts let by the Commonwealth of Virginia in the Peninsula area in April 1978. The Basic employees involved in the conspiracy were Steven Colosi, then manager of Basic's asphalt division (Tr. 416) and David Howell, who supervised both the highway construction and asphalt divisions of the company (Tr. 416-417). The president of Basic testified that for the time period in question, he entrusted the day-to-day operation of the asphalt division to Howell and Colosi, to whom he had delegated final bidding authority on all state asphalt work (Tr. 688-689; C.A. App. 230-232). Indeed, Basic's president testified that he signed the bid forms in blank and gave them to Howell and Colosi, who filled in the bids at the bidlettings (C.A. App. 234-235; Tr. 432).

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[1]The Peninsula area lies in and around Hampton, Newport News, and Williamsburg, and includes the counties of James City, York, Gloucester, Middlesex and Mathews (C.A. App. 19).

[2]Howell and Henry Branscome were each sentenced to one year's imprisonment, with all but 120 days suspended, and three years' probation. Henry Branscome was also fined $18,000. Henry S. Branscome, Inc. was fined $225,000 and Basic Construction was fined $450,000. C.A. App. 63-65. David Howell did not appeal his conviction.

3. The court of appeals affirmed petitioner's conviction in a per curiam opinion.[3] The court first rejected petitioner's argument that the jury should have been instructed to consider its alleged antitrust compliance policy in determining whether the government had proved the intent element of the offense (Pet. App. 2-5). The court found that the jury instructions given were consistent with the well established rule that a corporation may be held criminally liable for the acts of its employees if they were acting within the scope of their actual or apparent authority and for the benefit of the corporation, even if such acts violated company policy or express instructions (Pet. App. 4-5). This rule, the court of appeals held, was not changed by this Court's decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), which merely defined the intent element of a Sherman Act violation and did not address the issue of corporate liability for the acts of its agents (Pet. App. 4). Moreover, the court of appeals noted that the jury was instructed to consider petitioner's alleged antitrust compliance policy in determining whether the employees were acting to benefit the corporation (Pet. App. 5). Finally, the court held that the trial court had properly instructed that the corporation's intent is shown by the actions and statements of its officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation (*ibid.*).

The court of appeals also held that the trial court's failure to allow petitioner to offer opinion testimony regarding Colosi's credibility after he had testified for the government did not warrant reversal of the conviction. While the court concluded that the testimony should have been admitted in accordance with Fed. R. Evid. 608(a), it noted that petitioner had vigorously attacked Colosi's credibility during

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[3]The court also affirmed the convictions of Branscome, Inc. and Henry S. Branscome.

cross-examination, that Colosi's testimony was corroborated by two other government witnesses, and that at least one of Basic's proffered witnesses was a current employee of the company whose testimony on Colosi's credibility would accordingly have been weakened (Pet. App. 9). In these circumstances, the court of appeals concluded that any error was harmless.[4]

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner argues (Pet. 4-10) that the trial court's instructions on intent violate this Court's decision in *Gypsum* and the *Model Penal Code*, because the jury was precluded from considering its antitrust compliance program in determining the intent element of the Sherman Act violation.[5] This argument ignores the settled law governing corporate liability for the acts of its agents, the jury instructions in this case, and the evidence presented at trial.

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[4]Judge Widener believed that the exclusion of opinion testimony was not harmless error. He would have awarded a new trial on that ground. Pet. App. 10.

[5]On the issue of corporate liability for the acts of its agents, the trial court instructed the jury (C.A. App. 349):

> A corporation is legally bound by the acts or statements of its agents done or made within the scope of their employment, and within their apparent authority, acts done within the scope of employment and acts done on behalf of or to the benefit of a corporation, and directly related to the performance of the type duties the employee has general authority to perform.
>
> • • • • •
>
> When the act of an agent is within the scope of his employment or within the scope of his apparent authority, the corporation is held legally responsible for it. This is true even though the agent's

This Court, like every court of appeals that has considered the issue, has held that a corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, actual or apparent, and was intended to benefit the corporation. This is true even though the unlawful conduct was not specifically authorized, or was even contrary to the agent's actual instructions. *United States* v. *A & P Trucking Company*, 358 U.S. 121, 125-126 (1958); *United States* v. *Koppers Co.*, 652 F. 2d 290, 298 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-1007 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-205 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *Continental Baking Co.* v. *United States*, 281 F.2d 137, 149-151 (6th Cir. 1960). See also *American Society of Mechanical Engineers, Inc.* v.

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acts may be unlawful, and contrary to the corporations [sic] actual instructions.

The court also gave the following instructions, essentially as requested by petitioner (C.A. App. 350 and 29):

> A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position.
>
> However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.

Finally, the trial court instructed that "[a] corporation's intent is shown by the actions and statements of its officers, directors and those employees who are in positions of authority or have apparent authority to make policy for the corporation" (C.A. App. 351). This instruction also follows almost verbatim an instruction requested by petitioner (C.A. App. 31).

Hydrolevel Corp., 456 U.S. 556 (1982) (nonprofit corporation subject to treble damage liability under the antitrust laws for the antitrust violations of its agents committed with apparent authority).

Contrary to petitioner's contention (Pet. 7), an instruction in a Sherman Act case that a corporation is responsible for the acts of its agents does not convert a violation of that statute into "a strict liability offense." Such an instruction plainly does not relieve the government of proving the intent element of the offense. Indeed, the jury here was expressly instructed that the government was required to prove two types of intent beyond a reasonable doubt: the intent to agree "and the intent to affect [sic] the object of the conspiracy" (C.A. App. 351). The government proved this intent element by establishing that petitioner's employees, using the authority expressly delegated to them and acting to benefit the corporation, knowingly participated in a conspiracy to rig bids. No further proof of intent was required.[6]

This Court's decision in *United States* v. *United States Gypsum Co.*, *supra*, on which petitioner relies, merely defined the intent element of a Sherman Act offense; it did not address the question of whose intent may be imputed to the corporation.[7] Thus, *Gypsum* casts no doubt on the

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[6]See, *e.g.*, *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 682-683 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-296 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Society of Independent Gasoline Marketers of America*, 624 F.2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-466 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1105 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

[7]In *Gypsum*, this Court invalidated a jury instruction that allowed the defendants to be convicted for price fixing if the jury found that the *effect* of defendants' actions resulted in fixed prices, even if their intent has been merely to comply with the Robinson-Patman Act, 15 U.S.C.

principle that a corporation may be held criminally liable for the conduct of its agents, within the scope of their authority, for the benefit of their corporation.[8]

Nor does the *Model Penal Code* (Proposed Official Draft 1962) (MPC) absolve petitioner of responsibility for the actions of its employees here. While the MPC 207(5) provides that evidence that a high corporate official used due diligence to prevent the commission of the offense is a defense in a criminal prosecution, that defense expressly does "not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense." MPC 207(5). Price fixing is precisely the type of offense "for which the legislature has plainly intended to impose liability on corporations." *Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1251-1252 (1979).

13(b), by checking competitors' prices before "meeting the competition." This Court held that, contrary to the trial court's instructions, intent is an element of a Sherman Act violation.

[8]Petitioner's suggestion (Pet. 8-9) that the jury instructions in this case are inconsistent with *United States* v. *Hilton Hotels Corp.*, *supra*, and *United States* v. *Koppers*, *supra*, is incorrect. In *Hilton Hotels*, the corporation was held criminally liable because a purchasing agent for one of its hotels had entered into a conspiracy to boycott certain suppliers even though he had twice been warned not to join the boycott. The agent himself admitted receiving these instructions, but testified that he had joined the boycott nevertheless because of his personal animosity toward one of its objects. As in this case, the district court in *Hilton Hotels* correctly instructed the jury that the corporation was responsible for the acts of its agents within the scope of their employment. 467 F.2d at 1004. In *United States* v. *Koppers*, the court of appeals simply did not comment on the limited reference made to Koppers' alleged antitrust compliance policy. Rather, it expressly approved an instruction stating that a corporation was criminally responsible for the acts of its agents "done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform" (652 F.2d at 298).

In any event, the trial court did instruct the jury that it could consider petitioner's compliance policies, if any, in determining whether petitioner's employees had acted to benefit the corporation (see n. 5, *supra*). Indeed, petitioner argued at length that its purported antitrust compliance policy rendered bidrigging beyond the scope of Howell's and Colosi's employment (see Tr. 1047-1051, 1054-1056). The jury, by its guilty verdict, rejected this argument, and rightly so, for the evidence established that the alleged compliance policy postdated the violation at issue.[9]

2. Petitioner also argues (Pet. 10) that it was "deprived of its opportunity to introduce evidence relating to the truth and veracity of Steve Colosi," one of the government's witnesses against petitioner. In fact, however, petitioner strongly attacked Colosi's credibility on cross-examination by questioning him at length about alleged self-serving and dishonest actions while he was employed by petitioner (C.A. App. 178-182). Indeed, Colosi admitted that he had lied previously concerning his involvement with bidrigging (C.A. App. 169). Since much of the proffered testimony involved the same incidents that petitioner had explored during its cross-examination of Colosi (compare C.A. App.

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[9]While its bidrigging activities reached back to the early 1970's (C.A. App. 150-151), petitioner did not fire Howell for bidrigging until 1979, a year after the offense here, when the government had already begun its grand jury investigation of area highway contractors for bidrigging (C.A. App. 162). Colosi was not fired until 1980, although he had been caught bidrigging at least eighteen months before (C.A. App. 163-164; Tr. 716). Other employees were not told the reason for the firings (Tr. 733-734; Gover't Exh. 63). Prior to the bidrigging at issue in this case, the company's "unwritten policy" against bidrigging amounted to vague instructions "not to embarrass the company," or, in some cases, not to talk to competitors about price fixing (C.A. App. 169, 194-195, 252, 277, 319, 324, 326). Far more explicit warnings were found legally insufficient as a defense to criminal Sherman Act liability in *Hilton Hotels, supra*, the case on which petitioner relies (Pet. 8).

301-303 with C.A. App. 178-182), the district court had discretion to exclude the proffered testimony as cumulative. *United States* v. *Dominquez*, 604 F.2d 304, 310-311 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). But even assuming, as the court of appeals found, that the proffered testimony should have been admitted, petitioner has failed to prove that it was prejudiced by the exclusion.[10] As the court of appeals noted, the exclusion of the proffered testimony was harmless in light of the corroboration of Colosi's testimony by other government witnesses, the extensive attack on Colosi's credibility by petitioner during cross-examination, and the fact that "at least one of the witnesses" petitioner attempted to call was a current employee of the company whose testimony was suspect for that reason (Pet. App. 9).[11] The appellate court's finding that the exclusion of the proffered testimony was harmless is based on the particular facts of this case, and does not present an issue of sufficient importance to warrant review by this Court.

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[10]In *United States* v. *Davis*, 639 F.2d 239, 244 (5th Cir. 1981), on which petitioner relies (Pet. 12), the court of appeals disagreed with the trial court's assessment of the cumulative nature of the proffered testimony and noted that there had been only limited impeachment of the government's key witness. Here, by contrast, there had been a wide ranging assault on Colosi's credibility during cross-examination and there is other evidence in the record corroborating Colosi's testimony.

[11]Apparently *both* proffered witnesses were current employees of petitioner (Pet. 10-11; C.A. App. 299-300).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10

No. 83-272

In The

Supreme Court of the United States

October Term, 1983

BASIC CONSTRUCTION COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER BASIC CONSTRUCTION COMPANY

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REPLY BRIEF ON BEHALF OF PETITIONER BASIC CONSTRUCTION COMPANY

I.

INTRODUCTION

This case raises important questions of first impression in this Court concerning the antitrust criminal responsibility of a corporation for the unauthorized acts of its minor employees. Basic Construction Company filed its petition for a writ of certiorari on August 19, 1983. After obtaining an extension of time, the Government filed its brief in opposition on October 3, 1983. Because the Government's brief both mischaracterizes the evidence of record and misstates the applicable governing law, this brief is submitted in reply.

II.

ARGUMENT

The Government's brief suggests that there is no authority for the proposition that a corporation's diligent enforcement of an antitrust compliance policy provides a defense to a Sherman Act Section 1 prosecution. Citing an article from the Harvard Law Review,* the Government contends that the due diligence defense recognized by the Model Penal Code does not apply in the price fixing context because "[p]rice fixing is precisely the type of offense 'for which the legislature has plainly intended to impose liability on corporations.' "** The quotation lifted by the Government from the Review stops just short of the passage which expressly recognizes that the diligent enforcement of antitrust compliance policy may provide a defense to Section 1 prosecution:

> But the draftsmen of the Model Penal Code, believing that the primary purpose of holding corporations accountable for the acts of lower-level employees is to encourage diligent supervision by managerial officials, added an affirmative defense: the corporation can escape liability under the second system by proving by a preponderance of the evidence that the high managerial agent with supervisory responsibility over the subject matter of the offense acted with "due diligence" to prevent it.***

The Government offered no support for its contention that alleged bidrigging violations fall within any exception to Section 2.07(5) of the Model Penal Code.

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* *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1251-52 (1979) [*Developments in the Law*].

** Government Brief at 7.

*** *Developments in the Law*, 92 Harv. L. Rev. at 1252.

The Government's characterization of the "settled law" is even more suspect. According to the Government, a corporation may be held absolutely liable for the criminal acts of its employees "even though the unlawful conduct was not specifically authorized, or was even contrary to the agent's actual instructions."* To be sure, at least two courts of appeals have approved the due diligence defense and recognized that the corporation's issuance of explicit instructions and concomitant enforcement of an antitrust compliance policy provides a defense to a Section 1 prosecution. In *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1972), the Ninth Circuit concluded that although "general" instructions without more provide no defense to a Section 1 charge, a corporation might gain exculpation if the general instructions are enforced by "means commensurate with the obvious risks." Similarly, in *United States* v. *Koppers Co. Inc.*, Crim. No. 79-85 (D.Conn., June 26, 1980), the district court charged the jury that:

> One of the factors, among others, that you may consider in determining the intent imputed to Koppers Company through its [managerial] agents or employees is whether or not that corporation had an antitrust compliance policy. In this regard, you are instructed that the mere existence of an antitrust compliance policy does not automatically mean that a corporation did not have the necessary imputed intent. If, however, you find that Koppers Company acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance program in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining

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* Government Brief at 5.

> whether or not to impute an agent or employee's intent to the Koppers Company.*

The court's instruction was expressly approved on appeal by the Second Circuit. *United States* v. *Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981) ("on all issues relevant to this case the [Model Penal] Code's suggested standard of imputed liability in antitrust cases is precisely the one followed by the district court").

In the instant case, both Basic employees, Howell and Colosi, were warned specifically not to collude with competitors on the bidding of asphalt paving contracts. *See* J.A. 171, 219, 221, 224, 253, 292-93, 318-21, 324. Unlike the corporate defendant in *Hilton Hotels*, Basic undertook the most severe measures available to it to enforce its policy. There was no evidence that the colluding purchasing agent in *Hilton Hotels* received any discipline; Basic fired its errant employees, Howell immediately and Colosi as soon as Basic could satisfy itself that he had ignored the explicit warnings given him after Howell's discharge. Both were terminated well more than a year before any indictment was returned against Basic. The facts therefore present an appropriate case, even within the meaning of the Government's cases, for submission to the jury on the issue of the corporation's policy of anti-collusion. *See also United States* v. *Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment . . . It is a question of fact whether measures taken

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* *United States* v. *Koppers Co. Inc.*, Crim. No. 79-85 (D.Conn., June 26, 1980) *reprinted in* Lipson, *A Survey on the Ins and Outs of Antitrust Compliance*, 51 Antitrust L.J. 517, 524 n.15 (1983).

to enforce corporate policy in this area will adequately insulate the corporation against such acts . . .").

In an effort to paint Basic's policy as a whitewash, the Government argues that the "compliance policy post dated the violations at issue." They contend that "[w]hile [Basic's] bidrigging activities reached back to the early 1970's, [Basic] did not fire Howell for bidrigging until 1979, a year after the offense here, when the Government had already begun its grand jury investigation of area highway contractors for bidrigging."* The Government has, unintentionally we are sure, completely misstated the trial evidence to create a totally erroneous impression of the facts. As the Government would have this Court see it, Basic kept Howell on the payroll for a year after Basic knew of his bidrigging and fired him only when the "government had already begun its grand jury investigation of area highway contractors for bidrigging."

The unrefuted evidence at trial indicated that Basic's management had no knowledge of Colosi's or Howell's bidrigging activities until 1979 when George Lemon exposed Howell's collusion on the Butler Farms Road project to William Shaw. J.A. 224, 280, 296; Tr. 463. Howell was terminated immediately upon his being confronted with the facts. Not only did Howell and Colosi fail to disclose the bidrigging to management, they attempted to conceal it. J.A. 280, 296; Tr. 440-41, 463. Contrary to the Government's representation, indictment of highway contractors did not take place until at the earliest February, 1980, almost a year after Howell was terminated. *See United States* v. *Ashland-Warren, Inc., et al.*, Criminal No. 80-0022-R (E.D. Va., Feb., 1980). Thus, the inference which the Govern-

* Government Brief at 8 n.9. The indictment charged allocation of highway resurfacing contracts let in 1978.

ment has attempted to create is both misleading and unsupported by the record.

The proof for Basic demonstrated overwhelmingly that the company's policy was not a whitewash or a frill. As early as 1975, Highway Department employees and Howell and Colosi in particular were repeatedly admonished not to collude with competitors on highway paving work. J.A. 171, 221, 292-93, 318-21, 324. In group meetings of Basic's Highway Department beginning in late 1977, Basic's vice president warned employees, including Howell and Colosi, that they should be careful not to violate the antitrust laws. J.A. 292, 319. They were well aware that violation of the policy would lead to dismissal. J.A. 252, 309, 323. It was, of course, up to the jury to determine whether Basic's policy was real or a sham. But the trial judge's instructions precluded the jury's consideration of the evidence on the issue of the corporation's intent to violate the antitrust laws.

III.

CONCLUSION

Although there was substantial evidence in this case that Basic had diligently disseminated and enforced a policy of compliance with the antitrust laws, the district court refused to instruct the jury either that proof of due diligence provided a defense to the Section 1 charge or that such evidence could be considered on the issue of the corporation's intent to violate the antitrust laws. Instead, the court limited the jury's consideration of the policy to the issue of whether the errant employees had acted to benefit the corporation and instructed the jury that unauthorized conduct, even if contrary to the employee's actual instructions, could be imputed to the corporation.

The instruction given on the scope of a corporation's criminal liability for acts of its employees went to the very essence of Basic's defense at trial. The United States points out that Basic did not deny the criminal conduct of its employees, Howell and Colosi. That much is true. But the issue squarely presented for this Court's review is whether under the circumstances of this case a corporation should be held strictly liable for the criminal acts of employees even though the employees deliberately violated the company's policies and instructions. Although this Court's decision in *United States* v. *United States Gypsum Company*, 438 U.S. 422 (1978), established that intent is an essential element of a Section 1 offense, the instruction prevented the jury from considering testimony by Basic's management and employees that Basic had promulgated, disseminated and enforced a policy against collusion with competitors on bidding.

Because at least two courts of appeals have held that such evidence may provide a defense to a Sherman Act Section 1 charge, this Court has an opportunity to clarify the scope of a corporation's antitrust criminal responsibility for the unauthorized acts of its minor employees.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court I this day served three (3) copies of the foregoing reply brief on behalf of petitioner Basic Construction Company upon each counsel for all of the parties required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

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By Lewis T Booker .....
LEWIS T. BOOKER

Dated: October 26, 1983